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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE, Plaintiff and Respondent, v. NEDRICK AARON BROWNLEE, Defendant and Appellant.	C039532 (Super. Ct. No. 01F00705)

On the night of October 31, 2000, defendant stabbed two men with a knife. A jury convicted him of two counts of assault with a deadly weapon (Pen. Code, § 245, subd. (a)(1)) and he admitted a prior conviction for negligent firearm discharge (*id.*, § 246.3), which was also a strike. The trial court sentenced him to prison for 13 years. On appeal, defendant contends the trial court (1) should have reopened jury selection after excusing a juror, (2) failed to advise him properly when he admitted the prior, and (3) failed to give a unanimity instruction. We shall affirm.

FACTS

On Halloween night, 2000, Johnny Williams, Richard Wilhite and defendant were playing dominoes and drinking beer at Wilhite's apartment; also staying at the apartment were LaSandra Arnold, who had previously dated defendant, and her baby son. Arnold had stopped seeing defendant at the beginning of October, but she ran into him that night and invited him in. Arnold considered Williams to be her uncle. As the men played, Arnold became bored and went to bed with her son.

Williams and defendant went to a store to buy "cigarettes and more beer maybe." Williams, in his avuncular role, questioned defendant about his relationship with Arnold and his intentions. Back at the apartment, defendant, who had smoked cocaine earlier, asked Wilhite (whom defendant *knew* had cocaine) to give him some cocaine, but Wilhite refused. At about that time, Williams told defendant he needed to go talk to LaSandra about their relationship, instead of using more cocaine. Defendant distanced himself from the idea of a permanent relationship with Arnold. Defendant went into the kitchen. He returned and slashed Williams in the head with a knife, punched him in the mouth, then went after Wilhite. Williams tried to leave, but "he started trying cutting at me, and I fell, you know." Williams was able to get out because defendant again turned on Wilhite.

Arnold woke up when Williams ran into her room, bleeding from the face and saying "He's crazy"; then Williams ran out and up and down the street shouting for help. Arnold found Wilhite

on the kitchen floor and defendant "had his knee in Richard's chest with a knife to his neck." At some point she saw Wilhite had been stabbed in the neck and arm. Williams had a cut to his head, a swollen lip, and some loosened teeth.

By the time the police came, defendant had barricaded himself in the bathroom. He told the police he was afraid they would shoot him. Later he slid several knives under the door and came out. Defendant had no visible injuries and told an officer he had no memory of what had happened.

At trial defendant testified he told the men that his relationship with Arnold was over and he was leaving. He went into the kitchen to get some water. When he returned, Wilhite accused him of stealing his drugs. Wilhite and Williams spoke "in hushed tones," then confronted defendant again about the drugs. Wilhite reached for a knife on the kitchen counter, but defendant got it first. Wilhite swung at defendant twice, but defendant warded off the blows *with the knife*, "and caught him right on top of the arm." Wilhite kept coming and defendant's knife "caught him on the back of his neck." Defendant tried to flee, but Williams "jumped right in front of me and tried to stop me," so defendant pushed him; as they struggled, Williams "ran into the knife," causing his head to bleed. At some point he grabbed Wilhite, who had resumed the offensive, and held him down on the kitchen floor, with his knee in Wilhite's chest. He put the knife to Wilhite's throat, and told him to stop the attack. Defendant grabbed some more knives and ran into the bathroom for safety; he claimed he could not leave the apartment

because *Arnold* was in the way. The bathroom door did not lock so defendant used knives to jam the door, as he claimed was the custom at that apartment. On cross-examination he conceded he was substantially larger than either Wilhite or Williams. He also claimed he did not want to push Arnold to escape the apartment.

DISCUSSION

I. Jury Selection.

Jury selection began on August 20, 2001. A panel of 60 prospective jurors was sworn, and 18 were seated in the jury box. Five jurors were excused for cause "by stipulation." Three jurors submitted hardship forms and the parties stipulated to excuse two of these; the People exercised a peremptory challenge against the third. Defendant exercised six peremptory challenges.

After 12 jurors and 2 alternates were accepted, the court dismissed the remaining prospective jurors. The court told the selected jurors they would be sworn in after lunch and excused them until that time, except for Juror No. 8. Juror No. 8 claimed financial hardship, having just found out that her employer would not pay her for jury service. She worked part-time "and I just called my boss at break, and you said double check on this, you and they told me that I was paid and then he just told me that I'm not." [*Sic*.]

The court said "All right. Counsel, I suppose then we will have to excuse this panel member." *Defense counsel remained silent*. The court apologized to the juror and said "My bailiff

passed me a note, and it was sitting on the side of my bench, and I didn't think to talk before I excused the other panel members so it's the Court's fault and you are excused." The juror's note is not in the record on appeal.

After the juror was excused defense counsel objected and moved to re-open jury selection, claiming he would have exercised his peremptory challenges differently. The motion was denied. The court reasoned that since the defense had accepted the alternates, either one of whom might have been substituted in for various reasons (e.g., illness of a juror) the defense had no complaint. "It's not unexpected that panel members are excused, and the only issue here is the Court's failure to deal with it prior to excusing the rest of the panel members, but you would be in the same position if the panel member had come after lunch and had said I just found out from my employer that I'm not paid, and she would then be excused, so I don't see any difference in your position as to whether or not this panel member is being excused because of the Court's failure to completely voir dire on hardship or whether she would tell us after lunch or any other time. There are two alternate jurors that you have approved."

After lunch, the trial court put on the record the reason why the jury had not been sworn to try the case: A subpoenaed witness (victim Williams) had not appeared and the prosecutor told the court if he did not appear after lunch the case would be dismissed, and asked the court to delay swearing the jury

until then, to avoid any double jeopardy problem. (See *In re Mendes* (1979) 23 Cal.3d 847, 853-854 (*Mendes*).) *The defense had agreed to this procedure*.

On appeal defendant contends the jury selection process resulted in prejudice, because he would have exercised his peremptory challenges differently. Neither at trial nor on appeal does he explain how he would have exercised them differently. We find no error.

A trial court's decision to discharge a juror is reviewed for an abuse of discretion. (*People v. Hart* (1999) 20 Cal.4th 546, 596.) "Unless the facts clearly establish a sufficient basis on which to reach an informed and intelligent decision, the court must conduct an appropriate hearing in the presence of litigants and counsel on the question of the juror's ability to serve." (*Mendes*, *supra*, 23 Cal.3d at p. 852.) In *Mendes*, a juror claimed her brother had died and the trial court excused her without notice to counsel or a hearing. *Mendes* affirmed, finding that "the reason for [the juror's] request to be excused clearly constituted 'good cause.' The action of a court in discharging a juror must be tested in the light of the evidence before it at the time of the decision." (*Ibid*.)

We take some guidance from *People v. Delamora* (1996) 48 Cal.App.4th 1850, a case where before substitution of jurors the jury had deliberated for over three days. "When two jurors were replaced without any inquiry about whether they would be willing to remain another day even if their employers would not pay them, the reconstituted jury reached a verdict in about three

hours." (*Id.* at p. 1855.) The court held, "Although a trial court does not abuse its discretion when it discharges a juror because of problems related to the juror's employment, the employment problem must be real and not imagined." (*Ibid.*) "We are not suggesting that a formal hearing must be held to determine good cause. . . . As noted above, however, the trial court's determination that good cause exists to discharge a juror must be supported by substantial evidence [citation] and where, as here, there is no evidence at all to show good cause (because no inquiry of any kind was made), the procedure used was by definition inadequate. [Citation.]" (*Id.* at p. 1856.)

In contrast, here there *was* an inquiry of the juror which showed good cause (financial hardship) and it was conducted in the presence of counsel. We find no abuse of discretion.

Defendant treats this case as if jury selection was improperly cut off before he could exercise all of his challenges. But the defense *agreed* that the jury would be selected, but the swearing-in would be delayed until after lunch. The defense had passed on using further challenges when Juror No. 8 was replaced. Therefore cases involving a trial court's refusal to allow the exercise of all available peremptory challenges before jury selection is complete are unavailing. (Cf., e.g., *People v. Armendariz* (1984) 37 Cal.3d 573, 582 ["a party's right to exercise peremptory challenges to a full panel . . . is compromised when remaining challenges are disallowed at a time when there is less than a full jury"].) The case is no different than if the jury had been sworn before

lunch. Because defendant agreed to the delayed swearing-in of the jury, we reject the claim that the trial court abused its discretion in refusing to reopen for the exercise of challenges he had not wanted to use before jury selection was complete.

Anticipating that we might conclude the jury was already selected, albeit not sworn, defendant also contends the record does not show good cause to replace the juror because the court did not ascertain the extent of her financial plight, and jurors may be questioned closely when necessary. Generally, a party must object to claimed trial irregularities. (*People v. McDermott* (2002) 28 Cal.4th 946, 984; *People v. Fudge* (1994) 7 Cal.4th 1075, 1100-1101.) This rule applies to alleged problems with jurors. (*People v. Davidian* (1937) 20 Cal.App.2d 720, 727 [complaint "came too late and can avail appellant nothing upon this appeal"]; cf. *People v. Dell* (1991) 232 Cal.App.3d 248, 254, fn. 1 [trial court aware of nature of objection, no waiver].) Here, defense counsel was present and remained silent when the court explained that it was about to discharge the juror. If the defense had any doubt about the accuracy of the juror's claim or the extent of her financial hardship, it had ample opportunity to object and have the facts examined. For lack of objection, the point is waived.

II. *Yurko* Error.

We agree with the People that the trial court did not follow correct procedures in accepting defendant's admission of the prior conviction, but that the error was harmless.

This court addressed a similar claim in *People v. Mosby*, formerly at 95 Cal.App.4th 967, review granted May 1, 2002, S104862. We adhere generally to the reasoning of *Mosby*, pending clarification of the law from the California Supreme Court.

Under the *Boykin-Tahl* rule, when a trial court accepts a guilty plea, it should elicit from the defendant a waiver of the constitutional right to a jury trial, to confront the People's evidence and to the privilege against self-incrimination. (*Boykin v. Alabama* (1969) 395 U.S. 238 [23 L.Ed.2d 274]; *In re Tahl* (1969) 1 Cal.3d 122.) *In re Yurko* (1974) 10 Cal.3d 857 (*Yurko*) extended the *Boykin-Tahl* rule to admissions of prior conviction allegations.

In *People v. Howard* (1992) 1 Cal.4th 1132, the California Supreme Court concluded that the failure of a trial court to obtain explicit waivers of the *Boykin-Tahl* rights did not require reversal in all cases. Instead "a plea is valid if the record affirmatively shows that it is voluntary and intelligent under the totality of the circumstances." (*Id.* at p. 1175.) Trial courts are still supposed to elicit waivers of the *Boykin-Tahl* rights when accepting an admission to a prior conviction, but trial court mistakes in such cases will not result in overturning the finding on the prior if the record shows the admission was knowing and voluntary. (*Id.* at pp. 1178-1179.)

In this case the trial court ruled the People could impeach defendant with convictions of negligent discharge of a firearm (Pen. Code, § 246.3), and vehicle theft (Veh. Code, § 10851). At the end of the first trial day, defense counsel told the

court defendant was planning to waive a jury trial "on the priors, if that point came up," that is if he were convicted. At trial defendant testified that he had suffered a conviction "for negligent discharge of a firearm," and another for vehicle theft. On cross-examination the prosecutor asked: "Now, you have a conviction for intentional discharge of a firearm in a negligent fashion? A. Shooting a gun in an inhabited dwelling." (*Sic*.)

After the verdicts, the following occurred:

> MR. DUDEK: Your Honor, Mr. Brownlee is prepared to admit the priors alleged to the extent that he had suffered those prior convictions. I would reserve argument on whether or not it does fall within the strike law for [judgment and sentencing].
>
> THE COURT: All right. Mr. Brownlee, you understand that you do have a right to a jury trial on the prior convictions? [¶] And have you discussed with him his constitutional rights?
>
> MR. DUDEK: I have, your Honor.
>
> THE COURT: And are you prepared, then, having discussed those rights with your counsel to enter an admission to the prior conviction?
>
> THE DEFENDANT: Yes.
>
> THE COURT: All right. Then do you admit that on August 25th, 1989, in [Alameda County Superior Court] you were convicted of the crime of a willful discharge of a firearm in a negligent manner in violation of section 246.3 of the Penal Code, a serious felony within the meaning of Penal Code Section 667(a) . . . and that as a result of that conviction you came within the provision of [the Three Strikes Law]? Do you admit that?
>
> THE DEFENDANT: Yes.

> THE COURT: All right. And once again, Mr. Dudek, have you fully discussed the consequences of this admission with him?
>
> Mr. DUDEK: I have, your Honor, and I join in it.

Thus, the trial court did not elicit explicit waivers of defendant's privilege against self-incrimination or his right to confront the evidence, as it should have done.

Shortly after *Yurko* was decided, we decided *People v. Lizarraga* (1974) 43 Cal.App.3d 815 (*Lizarraga*), in which the trial court elicited waivers about a prior conviction before procedures implementing *Yurko* became settled. The defendant had already waived a jury on the substantive charges when advisements regarding the prior conviction became necessary. (*Id.* at p. 819.) We said (*id.* at p. 821):

> When . . . the defendant makes a preliminary declaration of intent to admit the prior conviction, he implicitly acknowledges that the procedural agenda will not be followed. He effectually acknowledges that he has no defense to offer, that there will be no occasion for rebuttal, hence no need for live witnesses. To fill out the personal assurances necessary to a knowledgeable waiver, the trial court need only inform the defendant that he does indeed have a right to force the prosecution to produce the record of the prior conviction and a right to contest its validity. Upon a knowledgeable waiver of these rights, there is no need to warn the defendant that he is surrendering the right to cross-examine live witnesses, because the agenda will never reach that stage.
>
> Here the trial court informed defendant that despite the prior conviction's existence, he had a right to contest it. Defendant disclaimed any desire for contest. There would be no rebuttal, no cross-examination, no occasion for confrontation, hence no real need to mention confrontation.

Lizarraga's reception was mixed at best. (See *People v. Balderrama* (1990) 221 Cal.App.3d 282, 285-287 [collecting cases

disapproving part of *Lizarraga*]; but see *In re Ibarra* (1983) 34 Cal.3d 277, 285 [citing *Lizarraga* with approval for the proposition that legalisms are unimportant, "so long as [the admonition] conveys to the layman the essential character of the rights"].) Following our Supreme Court's decision in *Howard,* the quoted passage of *Lizarraga* makes sense, because it focuses on the voluntary and knowing nature of the defendant's admission, rather than on a hypertechnical view of on-the-record advisements and waivers.

In any event, here, trial counsel, a highly experienced criminal attorney, was asked if he had explained defendant's constitutional rights to him and he replied that he had done so. There is no basis in the record to question the validity of counsel's statement that he had properly advised defendant, and if that statement was incorrect, defendant's remedy lies in habeas corpus. (*People v. Pope* (1979) 23 Cal.3d 412, 428.) The trial court advised defendant explicitly about his right to a jury trial. At the jury trial *which had just been completed*, the defendant had exercised his right to testify on his own behalf and through counsel had exercised the right to confront the People's evidence, via cross-examination of witnesses. At that trial defendant had admitted that he had been convicted of the felony prior at issue. On this record it defies credulity to argue defendant's admission was involuntary or made out of ignorance. Although the trial court did not scrupulously follow the *Yurko* procedures, the error was harmless.

Defendant concedes it might be inferred his trial counsel properly advised him, but claims his admission could not have been knowing because he not only admitted the *prior*, he admitted it was a strike. Although the trial court did ask defendant an omnibus question which included both the prior and its status as a strike, the parties understood that defendant preserved the right to argue the prior was not a strike, as had been stated by his lawyer. Defendant made an argument at sentencing that the prior did not legally qualify as a strike, and the trial court rejected the argument on the merits, not because defendant had admitted to the strike. Reserving the right to argue about the legal affect of an admitted fact is not a reason to question the voluntariness or wisdom of the tactic of admitting that fact.

The true finding on the prior is affirmed.

III. Unanimity Instruction.

Pointing to evidence in the record showing each victim was possibly attacked at more than one time, defendant contends the jurors should have been given a unanimity instruction such as CALJIC No. 17.01, which requires jurors to agree on which alleged act a defendant committed. We disagree.

The unanimity rule "is primarily intended to ensure that jurors agree upon a particular act where evidence of more than one possible act constituting a charged criminal offense is introduced." (*People v. Mickle* (1991) 54 Cal.3d 140, 178.) Under what has become known as the "either/or" rule, "when the accusatory pleading charges a single criminal act and the evidence shows more than one such unlawful act, *either* the

prosecution must select the specific act relied upon to prove the charge *or* the jury must be instructed . . . that it must unanimously agree beyond a reasonable doubt that defendant committed the same specific criminal act." (*People v. Gordon* (1985) 165 Cal.App.3d 839, 853, original italics, disapproved on other grounds in *People v. Lopez* (1998) 19 Cal.4th 282, 292.)

The People showed defendant attacked both victims in a single furious outburst. This invokes the "continuous course of conduct" exception: A unanimity instruction is not required "when the acts are so closely connected that they form part of one and the same transaction[.]" (*People v. Thompson* (1984) 160 Cal.App.3d 220, 224.) In such cases, it is not reasonable to suppose the jury would divide on which particular sub-act took place. (See *People v. Schultz* (1987) 192 Cal.App.3d 535, 539-540.) "The 'continuous conduct' rule applies when the defendant offers essentially the same defense to each of the acts, and there is no reasonable basis for the jury to distinguish between them." (*People v. Stankewitz* (1990) 51 Cal.3d 72, 100.)

Neither did the defense theory present any basis to give a unanimity instruction. At closing argument before the jury, defendant argued the fight lasted but seconds, partly as an effort to explain away inconsistencies and gaps in defendant's story, as compared to the physical evidence, and partly to bolster the idea that defendant reasonably believed in the need to use self-defense, given the speed with which the events transpired. The defense argued "this whole thing transpired in a matter of seconds." And counsel argued the prosecutor

demanded unfair recall and accuracy from defendant, and "putting a thought process into something that is happening within a matter of seconds and then she is trying to ask [defendant to explain] those seconds by nanoseconds[.]"

Yet, on appeal defendant disavows these trial court theories and argues the assaults were so separate (albeit conceding the time was "of short duration") that a unanimity instruction was necessary. We disagree.

Although there is always the *possibility* a jury will be unconvinced as to a particular element of a charge, there was no reasonable basis, given the evidence, for the jurors to pick and choose among the bits of evidence. (See, e.g., *People v. Jefferson* (1954) 123 Cal.App.2d 219, 220-221 [defendant attacked officer with butcher knife, then with a pocket knife about 15 minutes later, no unanimity instruction required].) If it believed the People's theory (which it did), the attacks were part of a single furious assaults; if it believed defendant, he was defending himself against an unprovoked joint attack by Williams and Wilhite. Either way, there was no reason to give a unanimity instruction in this case.

DISPOSITION

The judgment is affirmed.

MORRISON, J.

We concur:

BLEASE, Acting P.J.

SIMS, J.